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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	DOCKET FILE COPY ORIGINAL
Telecommunications Services Inside Wiring	)	CS Docket No. 95-184
Customer Premises Equipment	)	

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REPLY COMMENTS OF RESIDENTIAL COMMUNICATIONS NETWORK, INC.

Residential Communications Network, Inc. ("RCN"), pursuant to Section 1.415 of the Commission's Rules, by its counsel, submits these reply comments to respond primarily to certain self-serving arguments presented by the franchised cable television community and others[1] with regard to the nature of video competition that Congress sought to promote, the appropriate cable demarcation point for multidwelling units ("MDUs"), compensation for use of wiring installed by an incumbent service provider, and competitive service provider access to inside wiring.[2] It is undisputed that, without access to consumers, there can be no significant competition in the video distribution marketplace. As detailed in the comments of numerous multichannel video programming distributors ("MVPDs") and others interested in increasing competition, the inability to gain access to inside wiring is a barrier to entry -- and often an insurmountable one -- to offering services to tenants in MDUs. Accordingly, RCN

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[1] *See generally* Comments of Time Warner Cable and Time Warner Communications ("Time Warner"), Cox Communications, Inc., Marcus Cable Company, et al., Liberty Cable Company, Inc., Tele-Communications, Inc., Continental Cablevision, Inc. and Cablevision Systems Corporation, Adelphia Communications Corporation, TKR Cable Company (collectively, "Incumbent Cable Providers") and the Cable Telecommunications Association (filed Mar. 18, 1996).

[2] Given the plethora of issues addressed in this proceeding, RCN's silence on any issue should not signify support or opposition for any of the positions advanced by the multitude of commenters in the opening comments of this proceeding.

urges the Commission, consistent with many of the comments submitted in this proceeding, to use its authority to create a competitively-neutral building access regime that will allow MVPDs to compete on the basis of service quality and price. While these reply comments focus primarily on the video marketplace, RCN believes strongly that the Commission must also adopt inside wire rules that promote competition and remove barriers of entry for competitive telephone service providers.

I. THE COMMISSION SHOULD ADOPT THE GUIDING PRINCIPLES ADVANCED IN RCN'S COMMENTS.

As an initial matter, RCN submits that no argument presented in the opening comments of this proceeding should dissuade the Commission from adopting the fundamental guiding principles advanced by RCN which would permit competition to develop in the video and telephone markets. The Commission must: (1) ensure that the inside wiring rules provide consumers a choice of service providers without the inconvenience and cost associated with having multiple separate sets of inside wiring and connections installed by every available competitive provider; and (2) ensure that competitive service providers -- both telephone and video -- have non-discriminatory access to inside wiring necessary to deliver their services. Indeed, numerous commenters, including consumer groups and competitive service providers, concur with RCN's view that consumer choice in MDUs is best preserved by ensuring that competitive service providers can gain access, on a competitively-neutral basis, to critical inside wiring at the most efficient interconnection point. Specifically, the demarcation point should be located where an individual subscriber's line ("individual line") can be detached from the incumbent provider's common line ("common line") and reattached to the common line of the competitive service provider.[3/] RCN also concurs with NYNEX's view that, until technology has

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[3/] *See* Comments of Liberty Cable Company at 2-3, MultiMedia Development Corp. at 13-14, Media Access Project and Consumer Federation of America at 5, NYNEX Telephone Companies ("NYNEX") at (continued...)

evolved to the point that both video and telephone services can be provided over the same facility, the Commission's inside wire rules for telephone service and video service should be the same for all providers of each service, regardless of the facility used.[4]

II. THE COMMISSION SHOULD DEVELOP INSIDE WIRING RULES THAT WILL OPTIMIZE COMPETITION IN THE VIDEO DISTRIBUTION MARKET PLACE TODAY.

A. Congress Adopted Legislation Designed to Promote Competition, Not Just Facilities-based Competition.

Contrary to the position advanced by the franchised cable operators and their trade associations, Congress' intent in adopting Section 652(d)(2) of the Telecommunications Act of 1996 ("the 1996 Act")[5] was not only to promote facilities-based competition.[6] RCN does not dispute that Congress wanted to ensure that incumbent telephone companies and cable companies remain distinct entities and thereby maintain, at a minimum, the two networks that currently exist in most single dwelling units and in MDUs. This does not mean, however, that Congress intended that every competitive service provider must construct its own facilities, including multiple risers, conduits, and moldings in every MDU. To interpret Congress' intent in this fashion would be to doom video competition, if it exists at all, to a duopoly market structure. Of course, such a result is precisely contrary to the entire premise of the 1996 Act -- the promotion of a vigorously competitive communications market with as many options available to consumers as possible.

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[3](...continued)
7-8, and AT&T Corp. at 7 (collectively, "Competitive Service Providers") (filed Mar. 18, 1996).

[4] *See* Comments of NYNEX at 8-9.

[5] 47 U.S.C. § 251 *et seq.*

[6] *See* Comments of Time Warner at 7-8.

In support of their self-serving argument, the franchised cable operators allege that "[b]y generally prohibiting buyouts of the incumbent cable operator by the local telephone company, Congress has emphatically proclaimed its preference for facilities-based competition," and that Congress envisioned a "multiple-wire world."[7] However, neither the text of the 1996 Act nor the legislative history supports this narrow interpretation of Section 652(d)(2).

As detailed in the legislative history, the 1996 Act's Section 652 prohibition on buyouts was designed to "[prohibit] joint ventures between local exchange companies ("LECs") and cable operators that operate in the same market to provide video programming to subscribers or to provide telecommunications services in such market."[8] Certainly, Congress wanted to assure, to the extent competitively viable, the development of competitive distribution infrastructure. Nowhere, however, does the 1996 Act, or its legislative history, prescribe that competitive service providers such as RCN must construct their own facilities in order to compete nor, indeed, does it in any way indicate that Congress intended to limit competition to only two providers.

In prohibiting joint ventures and buyouts between LECs and cable operators that operate in the same market, Congress was concerned that such joint ventures and buyouts between LECs and cable operators, and the eventual concentration of power between such companies, would eliminate significantly, if not entirely, the possibility of a vigorously competitive video market. Congress simply wanted to foreclose the possibility that either a LEC or a franchised cable company would buy the

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7/ Comments of Time Warner at 13. (To be precise, it should be emphasized that the Act also prohibits the buyout by a cable operator of any local exchange carrier providing telephone exchange service within the cable operator's franchise area. § 652(b).)

8/ House Conf. Rep. No. 104-458, *Joint Explanatory Statement of the Committee of Conference*, at pp. 174-75.

other's infrastructure and create a monopoly bottleneck in any service area.[9] Congress did not, as Time Warner asserts, thereby "proclaim" a preference for facilities-based competition to the exclusion of other competition.

In an effort to preserve their absolute competitive advantage over new competitive service providers, the franchised cable community boldly attempts to transform a provision of the 1996 Act intended to insure that consumers have a choice between telephone and video service providers to one that circumscribes the field of competitors to two.[10] Section 652, by its terms, addresses the provision of cable services by telephone companies and the provision of telephone exchange service by cable operators. Section 652 does not prescribe the number of competitors or the nature of that competition. The Commission should not allow itself to be distracted by this non-issue. Rather, the Commission should focus its energies on adopting inside wire rules that are consistent with the overriding purpose of the 1996 Act -- "to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[11]

B. The Demarcation Point(s) In MDUs Should Be Located Where The Individual Subscriber Lines Can Be Detached From Service Provider's Network Common Line.

Consistent with RCN's initial comments, virtually all of the competitive service providers -- telephone and video -- and numerous consumer groups concur that to maximize consumer choice of service providers in MDUs, competitive MVPDs must have competitively-neutral access to an

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[9] Indeed, the Congress also opened the door to increased wire-based competition for video programming distribution by providing for LECs to develop Open Video Systems, which would permit multiple programmers to use LEC network infrastructure to deliver programming. *See* 47 U.S.C. § 651 (1996) (Regulatory Treatment of Video Programming Services); *see also* 47 U.S.C. § 653 (1996) (Establishment of Open Video Systems).

[10] Even assuming the first alternative service provider could obtain the permission of the property owner to install new facilities, practical space constraints in building conduits, risers and moldings would necessarily limit the number of competitive service providers that could access customers in an MDU.

[11] Opening statement of the Telecommunications Act of 1996, P.L. 104-104.

individual subscriber's unit without the prohibitive disruption, inconvenience and cost associated with constructing duplicative facilities.[12] These commenters not only confirmed that the Commission has significant cause for its concern that the "current [cable] demarcation point may be impeding competition in the video services delivery marketplace . . .,"[13] but a number shared with the Commission their real life experiences that demonstrate the impracticality of the current the cable demarcation point -- at 12 inches outside a subscriber's premises -- and the resulting adverse impact on competition.[14] As detailed in numerous comments, the current cable demarcation point at 12 inches outside the subscriber's premises, which in many instances is buried inside a wall, would require that a competitive service provider drill through cement blocks or otherwise engage in major construction to access the demarcation point. Setting aside the cost of such duplicative construction, landlords are understandably reluctant to submit their premises to such disruption. The practical consequence of this reality, therefore, is that the current cable demarcation point is often inaccessible and serves as a deliberate and effective barrier to entry, while conferring an absolute competitive advantage to franchised cable operators that control the "bottleneck facilities" -- the individual line -- to a consumer's home.

The incumbent monopoly cable operators pay lip service to the principle that access to the consumer's individual line is necessary to deliver broadband services.[15] They entirely fail, however, to acknowledge what constitutes "bottleneck facilities." As the comments demonstrate, the "bottleneck" is not simply wiring inside a subscriber's individual unit, it is the wiring that constitutes the individual

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[12] *See generally* Comments of Competitive Service Providers.

[13] In re *Telecommunications Services Inside Wiring, Customer Premises Equipment*, Notice of Proposed Rulemaking, CS Docket No. 95-184, FCC 95-504 (rel. Jan. 26, 1996), at ¶ 17.

[14] *See generally* Comments of Competitive Service Providers.

[15] *See generally* Comments of Incumbent Cable Providers.

line which is used to provide service to the unit. Accordingly, the Commission must disregard the empty statements which proclaim concurrence with open access *principles* but which propose precisely the opposite *reality*: retention of the current inaccessible demarcation point and therefore the *de facto* control of bottleneck facilities by the incumbent MDU monopoly provider. RCN submits that the only way that control of the individual subscriber line can be transferred from the incumbent cable provider to the subscriber is by locating the demarcation point where competitors can reasonably access the bottleneck facilities. Access to inside wiring should not be an element of competition. Moving the demarcation point to the individual/common line junction will render access to bottleneck facilities a competitively-neutral factor and allow consumers to choose service providers based on the quality, variety and price of their services.

Contrary to the view of some commenters that the Commission does not have the *authority* to move the demarcation point, RCN submits that the location of the cable demarcation point is a barrier to entry that the Commission is *obligated* under the 1996 Act to remove. In Section 257 the 1996 Act, Congress directs the Commission to complete a proceeding to:

> identify and eliminate by regulation any market entry barriers for entrepreneurs and other small business in the provision and ownership of telecommunications services and information services, or in the provision of parts or services to providers of telecommunications services and information services.[16]

Section 257 also sets forth the clear policy goal to remove barriers to market entry, when it requires the Commission's proceedings to identify and eliminate market entry barriers to

> seek to promote the policies and purposes of this Act favoring diversity of media voices, vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity.[17]

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[16] 47 U.S.C. § 257(a) (1996).

[17] 47 U.S.C. § 257(b) (1996).

The competitive service provider comments in this proceeding establish unequivocally that the location of the cable demarcation point is a barrier to entry that the Commission must eliminate for competition to develop.

C. *The Existing Cable Compensation Rules Do Not Need To Be Modified If the Location of the Demarcation Point Is Moved.*

The Commission has already rejected the "unconstitutional takings" argument advanced by incumbent cable operators in the cable home wiring proceeding.[18] Thus, in raising the "takings" issue in the context of this proceeding, the franchised cable operators are asking the Commission to revisit and reconsider a well-settled issue.[19] RCN submits that moving the demarcation point to a location that is accessible by competitors to promote competition and new entry in the provision of cable services does not require any further analysis of the takings issue.

RCN concurs with other commenters that the existing cable compensation rules do *not* need to be modified if the demarcation point is moved to facilitate competition in the provision of cable services in MDUs, because the existing regulatory scheme provides for equitable compensation regardless of the length of the wire involved.[20] Moreover, as AT&T's comments demonstrate, moving the demarcation point would not constitute a "taking" of the inside wire, because regulating the use of inside wire does not compel the permanent physical possession of the wiring by a third party.[21] As AT&T noted, the Commission has found that the regulation of the use of inside wire is not a "permanent

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[18] *In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Cable Home Wiring*, First Order on Reconsideration and Further Notice of Proposed Rulemaking, FCC 95-503, MM Docket No. 92-260, at ¶ 9 (Jan. 26, 1996) ("First Order on Reconsideration").

[19] *Id.*

[20] *See* Comments of Liberty Cable at 23. *See* Comments of AT&T at 14-18.

[21] *See* Comments of AT&T at 14-18.

physical occupation of property," but instead involves the regulation of commercial personal property, which is entirely consistent with its constitutional authority.[22]

III. COMPETITIVE SERVICE PROVIDERS SHOULD HAVE NON-DISCRIMINATORY ACCESS TO BUILDINGS IS NECESSARY FOR COMPETITION TO EMERGE.

RCN concurs with numerous comments that the Commission should preempt state mandatory access laws that discriminate against non-franchised operators.[23] Discriminatory access rights constitute a barrier to entry that retards the development of competition. As a new entrant to the telecommunications services industry, RCN must always overcome the hurdle of acquiring access to enter buildings to service customers, which can require months of negotiations that are not always successful. By contrast, incumbent service providers that have the benefit of mandatory state access laws can initiate their business merely by contacting the consumer. Unless applied in a non-discriminatory manner, this absolute right to enter private property pursuant to the state mandatory access statutes is a barrier to entry that confers a competitive advantage to the incumbent service providers. Section 253 of the 1996 Act empowers the FCC to preempt the enforcement of any discriminatory statute, regulation or legal requirement that creates a barrier to entry.[24] State mandatory access laws that require landlords to allow some service providers into their properties, but not others are discriminatory, anticompetitive and must be eliminated if competition is to develop in the video

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[22] *Id.* at 14. *See also Detariffing the Installation and Maintenance of Inside Wiring*, Second Report and Order, 59 RR 2d 1143, 1155-6 (1986) (April 9, 1985) ¶46; First Order on Reconsideration at ¶ 9. The Supreme Court clarified in *Lucas v. South Carolina Coastal Council* that the *per se* takings rule does not apply where a government merely regulates commercial personal property. 505 U.S. 1003, 1027-28 (1992). *See also Yee v. City of Escondido*, 503 U.S. 519, 522 (1992); *FCC v. Florida Power Corp.*, 480 U.S. 245, 253 (1987).

[23] *See* Comments of NYNEX at 17, MFS at 4, Liberty Cable at 13-22, and Wireless Cable Association at 6-10.

[24] *See* Comments of MFS at 4.

services market. Access to inside wiring must be competitively neutral and offered to new competitors on identical terms and conditions as offered to incumbent service providers. RCN strongly supports proposals of some commenters that the Commission work with state regulators and local franchising authorities to neutralize access to inside wiring as competitive factor in the delivery of telecommunications services and, where necessary, pre-empt rules and requirements which are inconsistent with the national goal of creating a competitive telecommunications marketplace.[25/]

IV. CONCLUSION

For the foregoing reasons, RCN urges the Commission to focus on the fundamental principle of full accessibility to inside wiring in developing regulations to govern a converging telecommunications and cable marketplace, in order to foster competition and the increased availability of alternate services.

Respectfully submitted,

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25/ *See* Comments of MFS at 11-12.